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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 984

ASPEN PICTURES, INC.,
Petitioner,

vs.

THE OCEANIC STEAMSHIP COMPANY and
MATSON NAVIGATION COMPANY,
Respondents.

Brief of Respondents in Opposition

On Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District

GREGORY A. HARRISON,
MARION B. PLANT,
111 Sutter Street,
San Francisco, California.
Attorneys for Respondents

SAMUEL L. HOLMES,
111 Sutter Street,
San Francisco, California.
Of Counsel

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

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OPINIONS BELOW

The opinions of the trial court on the motion for a new trial and of the District Court of Appeal of the State of California, Second Appellate District, Division One, are set forth at pages 10 and 16, respectively, of the appendix to the petition on file herein.

JURISDICTION

Respondents deny that this Court has jurisdiction as alleged in the petition. There are drawn in question in this

case contractual rights or immunities permitted under laws of the United States. Petitioner denies the existence of the contracts, but that contention has been resolved on a purely factual basis against it. The contracts (dock receipts and bills of lading) expressly incorporated the provisions of the Carriage of Goods by Sea Act as part of the contractual provisions.

Petitioner urges that, despite the contractual terms, the Carriage of Goods by Sea Act (herein sometimes called COGSA) is not applicable and that the Harter Act should be applied.

STATUTES AND REGULATIONS INVOLVED

The Carriage of Goods by Sea Act is not applicable *ex proprio vigore* but, as mentioned, was incorporated contractually in the dock receipts and bills of lading. Portions of COGSA are set forth at page 7 of the appendix to the petition. Other sections, particularly Sections 1304(2)(j) and 1307, Title 46, U.S. Code, are set forth in this brief.

As an alternative basis for certain jury instructions on the issue of notice of the terms of the agreement under which respondents accepted and held custody of petitioner's goods, respondents relied on the Intercoastal Shipping Act (Title 46, U.S. Code, Sections 843-848, particularly Sections 844 and 845(b), which require common carriers by water to file tariffs with the Federal Maritime Board (formerly United States Maritime Commission), and on the Shipping Act, 1916 (Title 46, U.S. Code, Sections 801-842, particularly Section 801, which defines a common carrier for the purposes of the other Act), all of which particular sections are set forth in the appendix to the petition. For the said jury instructions respondents also relied on the

provisions of Tariff Circular 3 (13 Federal Register 709 and Title 46, Code of Federal Regulations, Part 231, particularly Sections 231.0(j) and 231.5(g), which define a tariff and state the items which must be set forth in it). The latter sections are set forth in this brief.

Petitioner now claims to rely on the Harter Act (Title 46, U.S. Code, Sections 190-198), some portions of which are set forth in the appendix to the petition.

QUESTIONS

1. The first question presented by the petition relates to a matter unnecessary to the judgment below. The judgment is supported upon an independent ground of contract and agency law, not involving any federal statute or regulation.

2. The second question is a mixture of fact and law, based on erroneous factual assumptions, i.e., that the delay of the ship in question was or could have been reasonably anticipated. The verdict of the jury disposed of any factual questions.

3. The third question, like the second, relates to the issue of burden of proof. Petitioner now relies on the Harter Act and certain cases pertaining to the duty of providing a seaworthy ship. That duty is irrelevant to the case.

The claim of application of the Harter Act raises no substantial or important question, as petitioner impliedly conceded by its failure to even so much as mention that statute, directly or indirectly, in its petition for a hearing before the Supreme Court of the State of California. Since no hearing was granted, it may not be said that petitioner has waived the federal questions, but it has clearly indicated that they are not of real substance.

STATEMENT OF THE CASE

Petitioner seeks review of an appellate decision by the District Court of Appeal of the State of California, Second Appellate District, Division One, affirming a judgment entered upon a jury verdict in the Superior Court of the State of California in and for the County of Los Angeles. A further statement of the case is necessary as the petitioner has set forth more of an argument to a jury than a presentation of questions of law upon a settled state of facts.

The issues submitted to the jury were raised by the theory of the case adopted by petitioner during the trial. The jury found that the transportation of petitioner's goods was impossible because a strike intervened, that respondents were exonerated from liability because delay was caused by the strike, that respondents were not negligent in loading petitioner's goods in the circumstances then prevailing, that respondents could not have reasonably foreseen that the SS SIERRA would be affected by the strike, that reasonable care did not require that respondents notify petitioner of any possibility of delay, and that petitioner's goods were laden aboard the SS SIERRA in the course of reasonably prudent conduct and not in the face of any reasonably anticipatable delay. The jury also found that petitioner had notice of the terms and conditions contained in or referred to in the dock receipts which were exchanged for its goods when they were delivered to respondents on the dock prior to loading on the ship, and that petitioner also had notice of all the terms and conditions of the bills of lading. All of these facts are implied in the verdict and cannot be contested. There has never been any contention that the verdict is not supported by substantial evidence and such a contention cannot be raised at this time. Petitioner conceded in

its brief before the District Court of Appeal that there was a conflict in the evidence on the need for notice of the possibility of a strike. The resolution of that and other evidentiary conflicts by the jury is binding.

Only one italicized statement contained in the section of the petition herein entitled "Facts" is correct. All others are inconsistent with the verdict of the jury. Petitioner has merely stated its conclusions about matters which were the subject of conflicting evidence. The only italicized statement which is correct is that which relates that the bills of lading were not delivered until May 28. That fact does not change the situation because the actual delivery of the bills of lading was a formality routinely following actual loading. Agreement to the contract terms has been impliedly found by the jury. Petitioner had adequate notice of the terms and conditions under which respondents would have custody of its goods and of the terms and conditions of the contract of carriage before delivery at the dock, and the subsequent manual transfer of the bills of lading was not a prerequisite to the consummation of the agreement.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

A. The First Question Deals with Factual Matters, Independently Supported; There Are No Conflicting Decisions.

1. THE DECISION BELOW IS SUPPORTED ON INDEPENDENT GROUNDS, WITHOUT RELIANCE ON THE BINDING EFFECT OF NOTICE OF BILL OF LADING PROVISIONS SET FORTH IN A TARIFF.

Petitioner's first point relates to a matter which was an alternative basis for a finding by the jury. Independent of the question of the effect of the filing of a bill of lading as a part of a tariff there was adequate factual evidence that the petitioner had notice of and consented to the terms as a matter of contract.

Petitioner's statement of the case has not advised this Court of the important fact that it was issued a series of dock receipts at the time its goods were delivered to the respondents. The dock receipts were placed in evidence as Exhibits B, H, K and L. They were originally prepared on behalf of petitioner by its agent, Barnett International Forwarders, Inc., which had in its possession a stock of the respondents' forms. The agent prepared the dock receipts and had them presented to respondents for execution when the cargo was delivered to the dock. These acts were adopted and ratified by petitioner through its conduct in using the dock receipts, in providing them to respondents for execution, and in allowing respondents to rely on them in preparing the bills of lading. The dock receipts set forth the terms and conditions upon which respondents gained and held custody of the goods. Each of them contains the following statement in bold type:

> **"The goods above specified were received upon the understanding, and shipper by accepting duplicate dock receipt agrees, that except as otherwise provided herein the custody and carriage of said goods by The Oceanic Steamship Company shall be governed by the contractual terms and conditions of that Company's regular form of bill of lading, before as well as after its issuance * * * during any time that the goods are in the custody of the Company prior to loading, the Company shall hold them as warehousemen only and in the event of loss or damage during such time shall not be subject to the Burden of Proof prescribed by Section 4(2)(Q) of the Carriage of Goods by Sea Act."**

By accepting the dock receipts petitioner received notice of the contractual terms and conditions under which its goods would be handled by respondents from that moment on and agreed to them. As to the bill of lading terms, it was on notice and was bound by what it could have found in the

exercise of due diligence. Its own agent had copies of the bill of lading form. Furthermore, the full text of the tariffs, including the bills of lading, were open for inspection by the public at various offices of respondents as well as in the files of the Federal Maritime Board.

Petitioner's agent, the freight forwarder, was familiar with both dock receipts and bills of lading, and its knowledge of their terms and provisions, used in the ordinary course of the business for which the agent was engaged, was imputable to the petitioner. The jury was properly instructed on the issues of agency and the imputation of knowledge to a principal. The jury impliedly found in favor of respondents on all of these issues.

Under these circumstances the ultimate delivery of the bills of lading was a mere formality. The legal intent of the parties had been established long before the strike intervened, and both parties had accepted and acted upon the contractual terms referred to in the dock receipts.

By a carefully restricted statement of the case petitioner has attempted to create a federal question pertaining to the effect of the filing of a tariff which has set forth within it a complete regular form of bill of lading. The other theory which supports the judgment has been ignored. It is a factual defense, based on proof of adequate notice and acceptance and simple provisions of state law; it is not a basis for exercise of this Court's jurisdiction.

2. THE OPINION BELOW CONFLICTS WITH NO OTHER DECISIONS, IS CORRECT AND REQUIRES NO REVIEW.

Even were petitioner's first point the sole basis for the judgment below, it is without merit. The tariff applicable to the transaction was filed pursuant to the terms of the Intercoastal Shipping Act (Title 46, U.S. Code, Sections 843 to

848, inclusive). Section 844 of that statute requires that a carrier

> "* * * shall file with the United States Maritime Commission and keep open to public inspection schedules showing all the rates, fares, and charges for or in connection with transportation * * * The schedules filed and kept open to public inspection as aforesaid by any carrier shall plainly show * * * *any rules or regulations which in anywise change, affect, or determine any part or the aggregate of* such aforesaid rates, fares, or charges, or *the value of the service rendered to the* passenger, *consignor, or consignee.*
>
> * * * * * * *
>
> The commission shall by regulations prescribe the form and manner in which the schedules required by this section shall be published, filed, and posted * * *" (Emphasis supplied.)

The Intercoastal Shipping Act, by Section 845b, is applicable to the shipment of cargo from California to American Samoa through operation of Section 801 of the Shipping Act, 1916 (Title 46, U.S. Code, Sections 801 to 842, inclusive).

Pursuant to the authority vested in the United States Maritime Commission (now the Federal Maritime Board), regulations were promulgated which were applicable to the tariff and the bills of lading under which respondent undertook to transport petitioner's goods. The regulations are found in Tariff Circular 3, *supra.*

Section 231.0(j) of the Regulations defines a tariff:

> "§ 231.0 *Definitions.* The following definitions of terms used in this part will apply unless the context indicates otherwise:
>
> * * * * * * *
>
> (j) 'Tariff': A publication containing the actual rates, fares, charges, classifications, *rules, regulations*

and practices of a common carrier for transportation by water." (Emphasis supplied.)

Section 231.5(g) states the requirements of a tariff:

"§ 231.5 *Contents of tariff publications.* Tariffs shall contain in the order named:

• • • • • • •

(g) *General rules and regulations.* General rules and regulations in clear and definite terms which govern the rates, fares, or charges in the tariff, the title or subject of each rule or regulation to be in distinctive type. Under this heading shall be shown all provisions which affect the charges for or the value of the service, such as separate charges for demurrage, wharfage, heavy lifts, long lengths, or other services in connection with the transportation and to what extent the rates, fares or charges in the tariff or schedule include such services, *and any other rule necessary to state plainly the arrangements sought to be established.* • • •" (Emphasis supplied.)

A tariff is not merely a list of rates but a statement of any contractual arrangement affecting or determining in any manner the value of the service rendered. The statute has been so interpreted by the Maritime Commission.* In the exercise of its function of determining the propriety of tariffs, bills of lading and charges, the Commission has specifically required that "any provisions of a bill of lading which affect the charge for transportation or the value of the service, to be effective, must be incorporated in the tariff." Docket 418, 2 U.S. Maritime Commission Reports, 143 at 145, and 150. See also Dockets No. 571 and No. 572 at pages 558, 581 and 584 of the same volume.

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*In construing a statute, the interpretation given to it by the administrative body charged with its enforcement is entitled to weight. *Boston & Maine R.R. v. Hooker*, 233 U.S. 97.

The tariff applicable to petitioner's shipment contained, in the manner which is common in the shipping industry, a statement under the heading "Rules and Regulations" that all shipments are subject to the terms of the bill of lading published on specified pages of the tariff.

The cases relied on by petitioner are inapposite. *New York, N.H. and H.R. Co. v. Nothnagle,* 346 U.S. 128 (1953), pertains to the attempt by a railroad to relieve itself from a duty of care. It has nothing to do with the inclusion in a bill of lading by contract of an exculpation from liability by reason of impossibility of performance. It may be against public policy for a carrier to attempt to relieve itself of its duty of care, but it cannot be said to contravene public policy for a carrier to adopt by contract the excuse of impossibility for nonperformance which is contained in a federal statute which adopts the international shipping policy known as the Hague Rules.

Pacific S.S. Co. v. Cackette, 8 F.2d 259 (CA 9, 1925), cert. den. 269 U.S. 586 (1926), and *Bernard v. U.S. Aircoach,* 117 F. Supp. 134 (DC, SD, Cal., 1953), simply hold it to be against public policy to insert shortened periods of limitations in tariffs. They do not take into account the very broad requirements of the Regulations quoted above. Since a carrier subject to them must set forth "the arrangements sought to be established," it would breach its obligations if it did not include in the tariff the contract of affreightment, including the excuses for nonperformance. Respondents conformed to the Regulations and are entitled to their benefits.

Petitioner has ignored the Regulations, yet they control the case and were foreign to the cases relied on by petitioner.

Boston & Maine R. v. Hooker, 233 U.S. 97 (1914), and *Western Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566 (1921), were first cited by respondents and are entirely consistent with the judgment.

There being no conflict with any relevant decision, and the decision below being consistent with the applicable Regulations, there is no reason for granting certiorari on the first question.

B. The Second Question Turns on Factual Findings Already Made in Favor of Respondents; There Is No Issue of Law.

1. PETITIONER ADMITS THAT IT HAD THE BURDEN OF PROOF OF NEGLIGENCE WHERE DELAY IS CAUSED BY AN EXCEPTED CAUSE.

In an action for delay in the transportation of goods, the proof can be broken down into (a) *prima facie* evidence of delivery to a carrier and failure of redelivery at the point of destination in a reasonable time, (b) evidence by the carrier of an intervening cause excusing nonperformance, and (c) evidence by the shipper of negligence depriving the carrier of its excuse. Petitioner admits that it has the burden of proof of parts (a) and (c) and claims that respondents failed to prove (b).

Petitioner's difficulties in this case are, first, that questions of fact cannot be reopened, and, second, that parts (a) and (b) were the subject of admissions in the pleadings and of indisputable proof. A finding of nonexistence of the excuse for nonperformance was precluded for, as stated by the District Court of Appeal:

> "It was undisputed, therefore, that the delay in the sailing of the SIERRA was caused by strike." (Petition Appendix, p. 29.)

Under the circumstances, petitioner is simply disguising as a question of law an issue of fact which it conceded in its

amended complaint. The question of the intervention of the strike as the cause of delay required no litigation.

> "Every material allegation of the complaint, not controverted by the answer, must, for the purpose of the action, be taken as true * * *" (California Code of Civil Procedure, Section 462.)

The only issue to be decided in the trial was part (c)—whether respondents were negligent so as to be deprived of the benefit of the legal excuse. Petitioner concedes it had the burden of part (c), but it failed to sustain the burden for the jury found that respondents were not negligent.

2. THERE IS NO CONFLICT OF OPINIONS.

The only burden of proof remaining in the case was upon the petitioner to show negligence. There is no conflict of opinions that such a burden is upon the shipper.

> "When appellee [the carrier] proved that the loss arose from an excepted cause, it discharged the burden resting immediately upon it."
>
> *The Maui,* 113 F.2d 1018 (CA 9, 1940).

The petitioner had to show negligence to make respondents liable despite the exculpatory clause. The authorities cited in the opinion below entirely support this principle and they are in accord with *The Maui* and the decision in *American Tobacco Co. v. SS Katingo Hadjipatera,* 194 F.2d 449 (CA 2, 1951), cert. den. 343 U.S. 978. See also Knauth on Ocean Bills of Lading, Fourth Edition, page 195; Carver's Carriage of Goods by Sea, Ninth Edition by Raoul P. Colinvaux, page 118; and Scrutton on Charterparties and Bills of Lading, Twelfth Edition by S. L. Porter, K. C., and W. L. McNair, page 282.

Schnell v. The Vallescura, 293 U.S. 296 (1934), is entirely consistent with the above. The discussion in that decision of

intermingled causes of loss does not detract from the basic principle. Petitioner's other cases (*Commercial Corp. v. N. Y. Barge Corp.*, 314 U.S. 104 (1941), and *The Edwin I. Morrison*, 153 U.S. 199 (1894)) are concerned with the warranty of seaworthiness of a ship, an irrelevant matter in this case. The rule on burden of proof was the same for many years before there were any statutes on the subject. See *Clark v. Barnwell*, 53 U.S. 272, 279 (1851).

The confused reference to "antecedent" negligence is meaningless. If respondents were negligent in a manner causing injury, the jury was instructed to find liability.* Since the jury found that there was no negligence contributing to the delay, this Court is not properly called upon to go behind its verdict. It is not argued that there is no substantial evidence to support it.

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*"This general rule of immunity, however, is subject to the limitation or qualification which I shall now state to you.

"The common carrier owes to the shipper the duty to exercise ordinary care in the handling of the shipper's property so as to avoid causing the shipper loss or damage, and the duty also to inform the shipper of any fact or facts which are known to the carrier but unknown to the shipper and which a person of ordinary prudence in the carrier's position would recognize as being likely to cause a substantial delay or detention of the shipper's goods beyond the usual time in transit. The reason for imposing the latter duty upon the carrier is to afford the shipper in such circumstances the opportunity to exercise his own judgment as to whether to make the shipment or to make other arrangements.

"The standard of care required of the carrier in the performance of these duties is that of ordinary and reasonable care. Neither the terms of the bill of lading nor the terms of any federal law operates to relieve a carrier of liability to a shipper for damage proximately caused by a breach of either of the duties which I have just defined. If you find that the defendant carrier in this case was negligent in respect to the performance of its duty to plaintiff, as I have defined that duty, and if such negligence was the proximate cause of damage to plaintiff, then plaintiff is entitled to recover." (Clerk's Transcript, pp. 91-92.)

C. The Third Question Depends Entirely on the Harter Act, Which Is Irrelevant.

1. RESPONDENTS CLAIM NO RELIEF FROM LIABILITY BY REASON OF THE HARTER ACT.

The Harter Act prohibits in Section 1 the insertion in bills of lading or shipping documents of any clause, covenant or agreement whereby the carrier shall be relieved from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery. Respondents did not insert any such clause in the bill of lading or any shipping document. They did not claim to be relieved from liability for negligence, fault or failure; they merely claimed they were not guilty of any negligence, fault or failure. This raised a factual issue which has been decided against the petitioner.

By Section 2 of the Act a carrier is prohibited from inserting in any bill of lading or shipping document any covenant or agreement lessening or avoiding the obligation to exercise due diligence properly to equip a ship and to make it seaworthy. Respondents did not include any such covenant or agreement. As an afterthought on appeal, petitioner has asserted the theory that due diligence was not used to obtain men who would not strike. This peculiar theory was rejected in *The Maui, supra.** Furthermore, respondents adduced proof, which was uncontradicted, that the only available source of seamen was the Sailors Union of The Pacific, the very union which was on strike. Hence, as a factual matter, this theory has been decided against petitioner.

By Section 3 a carrier is relieved of responsibility for loss or damage which results from fault or error in navigation or management of the ship, providing due diligence has been

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*See also Knauth, op. cit., page 223, for authorities holding that it is not necessary to concede the demands of strikers in order to be relieved of liability. If it were, the strike clause would be vitiated.

exercised to make the vessel seaworthy and to man and equip it. Respondents did not rely on the Harter Act in the trial court and have never contended that loss or damage to petitioner resulted from fault or error in navigation or management of the vessel. Because of this, the issues of seaworthiness and manning of the ship have never been relevant to the case. If respondents do not rely on that exception from liability, there is obviously no need for them to prove the prerequisite to the exception.

The petitioner has apparently misconceived the import of the cases applying the exception from liability allowed by the Harter Act. Under those cases if a carrier claims the benefit of a Harter Act exception, it has the burden of proving due diligence in regard to seaworthiness, manning and equipping, but those cases have no relationship to the issue of the burden of proof as it relates to the exceptions under COGSA, whether the Act is applicable *proprio vigore* or contractually.

2. THE HARTER ACT DOES NOT BECOME OPERABLE UNTIL A VESSEL BREAKS GROUND.

Petitioner insists that the Harter Act applies before a voyage begins, but has cited no authorities to support this proposition. It is true that certain acts of a carrier which will constitute due diligence must necessarily take place before a voyage has started, but this has nothing to do with the time when the statute becomes operable so that rights and duties may become fixed thereunder.

Petitioner has cited as authority 1 Benedict on Admiralty (Sixth Edition, revised by A. W. Knauth), Section 95, page 287. Petitioner failed to read sufficiently far in that section. On page 289 it is stated:

> "The [Harter] Act is not applicable until the voyage has commenced * * *."

The reason for this is clear from the statement in the same work on page 288:

> "The burden is cast upon the shipowner to prove (where loss is claimed to have been due to unseaworthiness) that the vessel was seaworthy at the commencement of the voyage or (as a condition to exemption from liability for a loss by faults and errors in navigation) that due diligence (which comprehends inspection) had been exerted to make her so."

In Mr. Knauth's volume on Ocean Bills of Lading, the operation of the Harter Act and COGSA are considered at length from page 163 to page 171. It is unquestionably Mr. Knauth's view that the Harter Act has absolutely no effect upon the case before the Court, because the voyage had not begun. It is said at page 167:

> "While neither the Harter Act nor the 1936 Act [COGSA] takes effect *proprio vigore* at the moment when the goods are received for shipment, and while the common or admiralty law controls up to the moment when the ships tackles are hooked on for the purpose of loading, the parties may undoubtedly agree to apply the terms of either Act instead of the common or admiralty law; and this is usually done in the bills of lading now in use."

That is exactly what was done in this case. By reason of the terms of the dock receipts and the bills of lading the parties agreed as a matter of contract that the terms of COGSA should apply from the moment the goods were received for shipment.

3. RESPONDENTS WERE RELIEVED FROM LIABILITY BY CONTRACT.

COGSA provides in Section 7 as follows:

> "Nothing contained in this Act shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the

responsibility and liability of the carrier or the shipper for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea."

Inasmuch as COGSA becomes operable only after goods are loaded and the Harter Act becomes operable when the ship breaks ground, the parties had the right to enter a contract excusing respondents from liability for loss, delay or damage by reason of a strike, through incorporation in the contract of the terms of COGSA. This was done in the bills of lading and, were there merit in the suggestion that the bills of lading were not actually issued until after the goods were loaded, the same provisions were incorporated by reference in the dock receipts which set forth the contractual terms under which respondents received and held custody of petitioner's goods before the loading occurred, from the moment of receipt.

In the decision below it is not ruled that the Harter Act may have no application to the duties of a carrier, as asserted by petitioner. It has merely been ruled that it has no application to the duties of the carrier in this particular case, a conclusion which is inevitable from the authorities above discussed.

CONCLUSION

The petition herein is largely based upon factual matters resolved against petitioner by a trial jury. There is no occasion for this Court to review such matters.

The question of the notice which petitioner had of the terms of the dock receipts and bills of lading is completely supported by a factual finding. Even were it not, petitioner has shown no conflicting decisions, for this case is governed

by federal regulations not considered in any cited authority and completely ignored by petitioner.

The second question purports to reopen matters disposed of by the pleadings and by uncontradicted evidence. The only issue triable to the jury was whether respondents were negligent. It is conceded that petitioner had the burden of proof on that issue, and the jury resolved the conflicting evidence against it. The authorities are in agreement that the burden of proof as to negligence, which deprives a carrier of the exculpation from liability provided by the strike clause of COGSA, is upon the complaining shipper.

The third question, which refers to the Harter Act, provides no basis for the granting of the writ because the Harter Act is irrelevant. The parties were entitled to agree by a contract that the provisions of COGSA should govern their relationship, which they did. The Harter Act was not relied upon defensively and, in any event, did not become operable as the voyage was never begun.

For the foregoing reasons it is respectfully urged that this petition for a writ of certiorari should be denied.

Dated: San Francisco, California, May 31, 1957.

Respectfully submitted,

GREGORY A. HARRISON,
MARION B. PLANT,
Attorneys for Respondents

SAMUEL L. HOLMES,
Of Counsel

Office - Supreme Court, U.S.
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THE OCEANIC STEAMSHIP COMPANY and MATSON NAVIGATION COMPANY,
Respondents.

REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENTS ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

LEONARD HORWIN,
RICHARD I. M. KELTON,
121 So. Beverly Drive,
Beverly Hills, California,
Attorneys for Petitioner.

R. L. MERONEY CO., INC., 1108 OAK STREET, KANSAS CITY 6, MO., HARRISON 1-3080

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 984.

ASPEN PICTURES, INC.,
Petitioner,

vs.

THE OCEANIC STEAMSHIP COMPANY and MATSON NAVIGATION COMPANY,
Respondents.

REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENTS ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

I. INTRODUCTION.

Throughout their entire Reply Brief, Respondents have restated the argument that this Court does not have jurisdiction since a variety of factual conflicts have been resolved impliedly against Petitioner by the jury's adverse verdict.

The rule of law that on appeal conflicts of evidence are deemed to have been conclusively resolved against the appellant by the trier of fact, has no application here. The questions presented to this Court derive from Petitioner's contention that the jury was improperly instructed on the applicable federal law. When the very instructions on which the jury rendered its verdict are the subject of an appeal, the proper rule of law is that the evidence must be construed most favorably to the Petitioner in passing upon the erroneous instructions. The reason for this rule is evident—without such a rule the erroneous instructions could seldom be challenged, even though the giving of the erroneous instructions was the reason for the jury's verdict.

Jaynes v. *Jaynes*, 98 Cal. App. 2d 447, 220 P. 2d 598 (1950);

O'Mera v. *Swartfiguer*, 191 Cal. 12, 15, 214 Pac. 975 (1923);

4 *Cal. Jur.* 2d 443.

The rule is stated in the *Jaynes* case, *supra*, at page 451, the court quoting in part from the *O'Mera* case, *supra*:

> "While in determining whether a verdict is supported by the evidence, we must assume that the jury accepted the view most favorable to respondent, nevertheless, *in considering erroneous instructions*, 'we must assume that the jury might have believed the evidence upon which the instruction favorable to the losing party was predicated, and that if the correct instructions had been given upon that subject the jury might have rendered a verdict in favor of the losing party.'" (Emphasis added).

Under this rule of law Petitioner's factual statement is correct, and the arguments advanced in the Petition for Writ of Certiorari are uncontradicted by Respondents' Brief.

II. REASONS FOR GRANTING THE WRIT.

A. The California Court's Decision Is in Conflict with the Decision of This Court and of the Ninth Circuit Court of Appeals, in Holding a Shipper Conclusively Bound by a Clause Which Exempted the Carrier from Liability for Strike-Caused Damages Contained in a Bill of Lading Filed with the Federal Maritime Board.

1. Respondents' Claim That the Decision Below Is Supported on Independent Grounds, Is Unsupported by the Record.

Respondents claim that independent of the instructions relating to the effect of the filing of a bill of lading as a part of a tariff, the jury could have found that the shipper had notice of, and consented to, the terms as a matter of contract.

This argument ignores the fact that the question of the entering into a contract was never submitted to the jury since the trial court regarded the shipper as conclusively bound by the terms of the filed bill of lading. Petitioner sought a jury instruction to place the factual conflict over the making of the contract for carriage before the jury, and this instruction was refused. (See Pet. Appen. pp. 39-40). In lieu of the refused instruction, the trial court instructed the jury that the Petitioner was conclusively bound by the terms of the bill of lading, once the carrier proved that it was filed with the Federal Maritime Board. (Pet. Appen. pp. 38-39).

There were a series of factual conflicts concerning the making of the contract which were removed from the jury's consideration. Respondents assume that, since the dock receipts were received by a freight forwarder (i. e. Barnett International Forwarders, Inc.), therefore the forwarder

was the agent for Petitioner for purposes of making the contract of carriage. However, Petitioner had contended, and there was uncontradicted evidence to the effect that, Petitioner had employed Barnett solely to assist in obtaining custom's clearance, and that Barnett acted as Petitioner's agent for no other purpose. Furthermore, there was the question of Respondents' fraud in purporting to make a contract with Petitioner (*i. e.* bill of lading) at a time when Respondents knew, and knew that Petitioner was unaware, that the contract could not be performed. Of course, if such fraud existed, it would have avoided the claim of consent to a contract. The applicable theory and cases regarding this fraud are briefly set forth in the Petition at page 11. Consistent with its erroneous position that Petitioner was conclusively bound by the terms of the filed bill of lading, the trial court refused Petitioner's instructions on the questions of fraud (Appendix to Pet. for Writ of Cert. pp. 39-40).

In short, the claimed alternative ground for the decision on this point, was never submitted to the jury, and it is idle to speculate on what the jury might have done, had the issue been properly presented. The fact that this defense was an afterthought even to Respondents is demonstrated by the fact that the Dock Receipts quoted in Respondents' Reply Brief were not pleaded as a part of the contract in Respondents' affirmative defenses based upon the contract, nor was the effect of the Dock Receipts argued before the trial court. The theory first found expression in Respondents' brief before the California District Court of Appeal.

2. Respondents' Contention That the Opinion Does Not Conflict with the Decisions of This Court and the Ninth Circuit Is Erroneous.

It is submitted that the distinctions Respondents suggest, between the instant case and *New York, N. H. and*

H. R. Co. v. *Nothnagle*, 346 U. S. 128 (1953), and the other cases cited and discussed in the Petition for Writ of Certiorari at pages 11-15, are distinctions without a difference.

B. Respondents Erroneously Rely on Their View of the Law That Evidentiary Conflicts Are to Be Resolved Against Petitioner, to Reach the Conclusion That the Second Question Turns on Factual Findings Made in Favor of Respondents.

Petitioner is here disputing the basic instructions on the burden of proof. It is erroneous to resolve the disputed facts in favor of Respondents when the jury rendered its verdict on instructions which Petitioner has shown in its Petition to be erroneous statements of the law.

Petitioner made no concession that it had the burden of proof of negligence, where delay is caused by an excepted cause applicable to the present case.

Respondents' analysis of the proof in an action for delay in the transportation of goods is oversimplified. By omitting the steps where the court committed error, the analysis reaches its erroneous conclusion. The proper analysis is as follows:

(a) The shipper must show *prima facie* evidence of delivery to a carrier and failure of redelivery at the point of destination in a reasonable time.

On this point both parties are in agreement. The burden of proof was on Petitioner, and Petitioner established the facts without contradiction.

(b) The carrier must show that it was entitled to an exemption either by reason of applicable law, or by proving a contractual exemption not in conflict with law.

Respondents concede that no exemption was available to them by statute (Brief p. 2). Therefore the Respondents had the burden of proving a valid contract, granting them exemption. Respondents did not meet this burden. They never even claimed any exemption under the contract, from the necessity of giving notice because the contract had no provision with reference to the question of notice—so the burden of proving their freedom from negligence in failing to give the notice was upon them. Thus, this decision, in holding to the contrary, is in conflict with the cases cited in the Petition. (Petition pp. 16-18). Nor did their contract exempt them from negligently loading the goods on a ship in the face of an anticipated strike. Again, no contractual exemption supports the view of the courts below or excuses their failure to follow the proper decisions of federal courts. Indeed, Respondents' reliance on the contract at all, is misplaced in view of the failure of the trial court to submit the question of the entering into the contract to the jury. (See argument under point A).

(c) If the carrier establishes that an exemption exists on which it may rely, it must then prove that the cause of the loss was due to the exempted cause, and not to some other cause.

This is the clear rule of *Schnell* v. *the Vallescura*, 293 U. S. 296 (1934), and other cases cited and discussed in the Petition at pages 18-20. This step of the analysis is omitted in Respondents' Brief, and so they have failed to contradict the statement of law set forth in the Petition.

Any assumption that Petitioner did not dispute that the strike was the *cause of the loss* is unwarranted in view of the complaint (Clk. Tr. p. 12, lines 1-20), and unjustified by the opinion of the California District Court of Ap-

peal. The opinion, as properly quoted by Respondents, states:

> "It was undisputed, therefore that the delay in the sailing of the SIERRA was caused by the strike." (Petition, Appendix, p. 29).

Certainly it was true that the *sailing* of the SIERRA was delayed due to the strike, but this does not warrant the assumption that the *damage to Petitioner* was due to the strike. Petitioner's contention throughout was that, but for Respondents' negligence in loading the goods on the SIERRA and in failing to give Petitioner notice of the anticipated strike, the delay in the sailing of the SIERRA would have been immaterial, for Petitioner's goods would not have been aboard the SIERRA. The legal question turned on a factual dispute, not over whether the SIERRA'S sailing was delayed due to the strike, but on whether Respondents were negligent in loading Petitioner's goods on the SIERRA and in failing to give Petitioner notice of the anticipated strike. Throughout the entire case to this point, Respondents have successfully obscured this basic distinction, despite Petitioner's attempts to make this distinction clear.

(d) Even after the carrier has established that it was entitled to an exemption (which Respondents failed to do here), and that the exempted cause was the actual cause of the damages (which Respondents have likewise failed to do here), Respondents must still prove themselves free from antecedent negligence contributing to the loss.

Respondents attempt to circumvent the real issue here by stating that Petitioner's reference to "antecedent negligence" is meaningless, because if respondents were negligent in any manner the jury was instructed to find

liability. The issue here presented—which Petitioner claims was resolved in conflict with existing decisions—is not whether or not Respondents would be liable for negligence (Respondents conceded this), but on whom rested the burden of proving the negligence or freedom therefrom. Respondents fail to address their Brief to the law stated in the Petition at pages 20-22, that the burden of proving itself free from antecedent negligence is upon the carrier, and so impliedly concede the correctness of Petitioner's position.

(e) Only after all of the foregoing points have been covered does the burden of proof shift to the shipper to prove that, notwithstanding an applicable exception which was the cause of the loss, the carrier's negligence occurring after the facts giving rise to the exemption, subjected the carrier to liability.

Since this point had not been reached, the burden of proof should not have been placed on Petitioner, and the decision of the courts below in placing it on Petitioner is in conflict with the decisions of the other courts in the decisions cited and discussed more fully in the Petition.

C. The Harter Act Is Clearly Relevant, and the Confusion Between This Decision and That of the Circuit Courts Should Be Resolved in This Court.

Respondents' argument on this point fully supports Petitioner's position. This is clear from the quotation upon which they rely from 1 *Benedict on Admiralty* (6th Ed., revised by A. W. Knauth), p. 288:

> "The burden is cast upon the shipowner to prove (*where loss is claimed to have been due to unseaworthiness*) that the vessel was seaworthy at the commencement of the voyage or (*as a condition to exemption from liability for a loss by faults and errors*

in navigation) that due diligence (which comprehends inspection) had been exerted to make her so." (Emphasis added).

This is precisely the point made in Petitioner's Petition at page 27. The language of the Act relating to the ship's breaking ground is with reference to the test of seaworthiness of the time the ship breaks ground, *when the carrier seeks exemption from a loss claimed to have been due to unseaworthiness* and when the *carrier* seeks exemption from liability for a loss by faults and errors in navigation.

Here, the lower courts have been misled by this language, and unfamiliarity with the law of Admiralty to conclude—even though it was the *shipper* (not the carrier) who was seeking the benefit of the Act—that all the provisions of the Harter Act were not effective until the ship breaks ground.

The above quotation emphasizes Petitioner's position that the Act provides only that the *carrier* does not get exemptions in the act (applicable after the voyage has commenced) unless his ship meets the test of being seaworthy at the time the ship breaks ground. The Act does not provide that the benefits for the protection of the *shipper* (which relate to conduct prior to sailing) are of no force unless the ship breaks ground.

Since the Harter Act is controlling as federal law, its limitations over contracts prevent the carrier from taking advantage of those provisions in the claimed contract which the carrier claims exempt it from liability.

SUMMARY AND CONCLUSION.

Apparently realizing that their reply could not be substantiated on the law, Respondents claim that the facts of this case preclude the presentation of questions within this Court's Jurisdiction. All this argument is based on Respondents' erroneous assumption that the facts are concluded by a jury verdict, when the legal issues involve the correctness of the jury instructions themselves.

Stripped of its illfounded factual argument, the weakness of Respondents' legal argument in the Reply Brief merely emphasizes the conflict between the decision below and those of the Circuit Courts and of this Court.

The determination of these questions relating to the basic law of contracts in Admiralty are within the jurisdiction of this Court, and are of paramount importance to the large segment of the business community relying upon water commerce for the transportation of goods.

Respectfully submitted,

LEONARD HORWIN,
RICHARD I. M. KELTON,
Attorneys for Petitioner.